

Wetlands Appeal Streamlining Regulations May 31, 2007

PREAMBLE

Delays in wetland permit appeals result are costly to appellants, applicants, and the Department. Many wetland permit appeals are resolved within 6 months through settlement and prescreening conferences. Many take more than a year to resolve. Governor Patrick directed MassDEP to reform the wetlands appeals process to allow for more timely action, without reducing the level of environmental protection. The comprehensive reform contained in the 2007 regulations in intended to accomplish this goal.

The new wetlands permit appeal process will continue to include prescreening, prefiled testimony and prior participation. These tools have worked to make the appeals process efficient. The new regulations build upon these tools and ensure a fair process of review for parties who have legal standing to appeal, require parties to present their evidence early in the proceedings, and make the hearing process more efficient to eliminate unnecessary delay.

MassDEP's regulatory changes are designed to provide timely and fair hearings. As such, an applicant who filed the notice of intent, an aggrieved person who participated in the prior proceedings, and a conservation commission may file an appeal. While not legally required, the new regulations allow conservation commissions to initiate appeals. Conservation commissions play an important role in the implementation of the Wetlands Protection Act, and have a stake in the outcome of the appeal that started with their decision. Ten residents, or an aggrieved person can intervene in an appeal early in the process.

Wetland permit appeals will continue to be initiated at MassDEP with a prescreening conference. This process will continue to screen appeals to determine whether they are amendable to settlement, mediation or dismissal. In the event that a case will proceed to hearing after a prescreening, the Presiding Officer will also determine the issues. By regulation the Presiding Officer will issue a scheduling order upon receipt of appeal that will schedule the prescreening within 30 days and the hearing within 120 days. Within this time frame, first the petitioner and then the responding parties must file their "pre-filed" direct and rebuttal testimony. Intervenors, such as ten resident groups, may also participate, but must meet the same deadlines for the filing of their testimony. To ensure that the process is fair for opponents of the project, the new regulations mandate that the applicant provide information about the project, and allow a site visit, at an early stage in the process.

The Presiding Officer will conduct an evidentiary hearing at MassDEP and will retain the option of transferring cases to DALA on a case-by-case basis where she determines that the timely resolution of a matter will benefit from DALA's assistance. The Final Decision will be issued within 6 months, and not more than 7 months if a major or complex appeal can not be resolved on an expedited schedule.

This revision focuses on prospective wetlands permit appeals. Cases that are already in the appeal process will continue under the 2004 wetland and appeal regulations.

Together these changes will increase efficiency of the appeal process, saving precious time and money for the appellants, applicants and MassDEP alike. These changes will be evaluated after 1 year, adjustments made if necessary and consideration will be given to extending this process to other appeals.

310 CMR 10.04

1. Definitions/Terms

Landowner—the owner of record of land or an interest in land that is the subject of a Reviewable Decision.

Major or Complex – means an appeal of a Reviewable Decision issued for work in a resource area that will be so designated due to the complexity or novelty of the issues, the magnitude of the project, the potential for environmental harm or benefit, significant public interest or public financing or other relevant consideration, as determined by the Commissioner or a Presiding Officer.

Reviewable Decision—A MassDEP decision that is a superseding order of conditions or superseding denial of an order of conditions, a superseding determination of applicability, and/or a superseding order of resource area delineation or a variance.

1. Timely Filings -

Papers required or permitted to be filed under this section must be filed with the Department, at the address designated in the Reviewable Decision, within the timelines specified herein. Papers shall be considered filed as set forth in 310 CMR 1.01(3).

2. Appeal Notice -

- a. Any applicant, landowner, aggrieved person if previously a participant in the permit proceedings, or conservation commission may request review of a Reviewable Decision by filing an Appeal Notice no later than ten days after the issuance of the Reviewable Decision. Previously participating in the permit proceeding means the submission of written information to the conservation commission prior to close of the public hearing, requesting a Reviewable Decision, or providing written information to the Department prior to issuance of a Reviewable Decision. The Appeal Notice must be filed with the Department with a copy sent to the appropriate regional Department office by certified mail or hand delivered within ten days after the date of issuance of the Reviewable Decision, and a copy thereof must at the same time be sent by certified mail or hand delivered to the conservation commission (if not filed by the conservation commission) and to the applicant (if not filed by the applicant). The Appeal Notice shall also be served by certified mail or hand delivered on any person that requested the action by the Department that resulted in the Reviewable Decision. In the event that the entity that requested the action is a ten resident group, the Appeal Notice shall be served on the designated representative of the ten resident group, whose name and contact information shall be included in the Reviewable Decision. Any party listed in this paragraph that fails to timely file an Appeal Notice pursuant to this section, shall be deemed to have waived its right to appeal the Reviewable Decision.
- b. The Appeal Notice shall include:
 - i. the Petitioner's complete name, address, phone number, fax number and email address and counsel's name, if any, address phone number, fax number and email address, if represented;
 - ii. The department's wetlands file number, if applicable, the name of applicant and address of the project.
 - iii. if filed by an aggrieved person, demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)(3)a) and sufficient written facts to demonstrate status as a person aggrieved;
 - iv. a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, section 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by

- the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision; and
- v. a copy of the Reviewable Decision appealed and a copy of the underlying Conservation Commission decision if the Reviewable Decision affirms the Conservation Commission decision
- c. An Appeal Notice that does not contain all of the information required in 1(b) above may be dismissed.
 - d. Within five business days of receipt of a request, the applicant shall make all documents submitted to the department in support of the Reviewable Decision, including but not limited to the notice of intent, plan of record, or other information, available to any person who states that they intend to appeal or intervene.
 - e. Within five days of the receipt of notice by the applicant and/or property owner, any person who has filed an appeal or intervened shall be allowed to visit the site, upon reasonable conditions of the applicant and/or property owner.
 - f. The Department, the conservation commission, the petitioner, the applicant, and any interveners pursuant to 310 CMR 10.05(7)(j) shall be deemed to be parties to the proceeding and are entitled to service of all documents filed in the proceeding, and shall be included in a certificate of service to accompany all filings in accordance with 310 CMR 1.01(4)(f).
 - g. Failure to submit all necessary information may result in a dismissal by the Department.
 - h. No work shall be undertaken until all administrative appeal periods from a Reviewable Decision have elapsed, or if such an appeal has been taken, until all procedures before the Department have been completed.
 - i. The Presiding Officer may rule on the timeliness, standing and compliance with the requirements of 310 CMR 10.05(7)(j)3.b. above, *sua sponte*, and provide the ruling to the parties within ten (10) days of receipt of the Appeal Notice.

3. Petitioner's Direct Case –

- a. A Party who has timely filed an Appeal Notice must file with the Department and serve a copy on all parties its Direct Case no later than forty-five days after the Prescreening Conference.
- b. Pursuant to 310 CMR 10.03(2), the Petitioner has the burden of demonstrating that the Reviewable Decision contains a substantial error of law or fact.
- c. The Petitioner has the burden of going forward which means producing in the Petitioner's Direct Case credible evidence from a competent source in support of the position taken.
- d. The Petitioner must establish the legal and factual basis for its appeal in its Direct Case. The Petitioner must address the issues identified by the Presiding Officer in the pre-screening report; failure to do so will result in a waiver of Petitioner's Direct Case for that issue. In addition, the Direct Case at a minimum shall include:
 - i. a description of the subject matter of the Reviewable Decision;
 - ii. If brought by an aggrieved person, credible evidence from a competent source that the person is aggrieved;
 - iii. credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s); and
 - iv. a request for a hearing. Failure to request a hearing shall be deemed a waiver of the Petitioner's right to a hearing.

4. Respondents' Direct Case -

A party that seeks to support or defend the Reviewable Decision shall file and serve on all parties a Direct Case within thirty days of the filing of the Petitioner's Direct Case. A responding party shall be deemed to be a "Respondent."

- a. Response Content: The response shall at a minimum include:
 - i. A rebuttal to the Petitioner's Direct Case setting forth the legal and factual basis supporting the Reviewable Decision, including relevant statutory and regulatory citations and evidentiary support consisting of credible evidence from a competent source;
 - ii. a clear and concise statement of issues;
 - iii. any affirmative defenses and evidentiary support for them, including but not limited to the defense of lack of standing; and

- iv. a request for an evidentiary hearing. Failure to request an evidentiary hearing in the Response shall be deemed a waiver of the Respondent's right to a hearing.
- b. MassDEP may file a Response, but may elect not to participate beyond filing the Response, however, the Presiding Officer may request MassDEP's continued participation in order to ensure a full understanding of the issues.

5. Intervention and Intervenors' Direct Case -

- a. A group of ten residents may intervene in a proceeding by filing and serving on all parties a Motion to Intervene within twenty-one days of the filing of the Appeal Notice. The Motion to Intervene shall provide the names, addresses, phone and fax numbers and email address of each of the members of the ten resident group, and a certification under oath by each member that they consent to the Motion to Intervene, and authorize the group representative to act for the member. The Motion shall also designate a representative who shall represent the group and receive documents on its behalf. Upon filing a Motion in conformance with this paragraph, the ten resident group shall be deemed a party, subject to disqualification if the Presiding Officer determines that the group does not consist of at least ten consenting residents.
- b. A person who claims that he or she would be aggrieved were the Reviewable Decision reversed or modified may intervene by filing and serving on all parties a Motion to Intervene within twenty-one days of the filing of the Appeal Notice. The Motion must include a statement demonstrating aggrievement, in accordance with 310 CMR 1.01(7)(d). Upon filing a Motion in conformance with this paragraph, the potentially aggrieved person shall be deemed a party, subject to disqualification if the Presiding Officer determines that the Intervenor is not aggrieved.
- c. An intervenor that contests the Reviewable Decision shall file a Direct Case that conforms to 310 CMR 10.05(7)(j)(3) no later than the due date of Petitioner's Direct Case. An intervenor that supports the Reviewable Decision shall file a Direct Case that conforms to 310 CMR 10.05(7)(j)(4) no later than the due date of the Respondent's Direct Case.
- d. The Presiding Officer may rule on the timeliness, standing and compliance with the requirements of 310 CMR 10.05(7)(j)5. above, *sua sponte*, and provide the ruling to the parties within ten (10) days of receipt of the Motion to Intervene.

6. Rebuttal -

- a. The Petitioner may file and serve on all parties rebuttal evidence no later than seven days after the deadline for the filing of the Respondents' and any Intervenor's Direct Case. The rebuttal evidence may not introduce issues not raised in the Direct Case, and must be limited to countering evidence submitted in a Respondent or Intervenor's Direct Case in support of the Reviewable Decision.

- b. A Respondent may file and serve on all parties rebuttal evidence no later than seven days after the deadline for the filing of the Petitioner's rebuttal. The Respondents' rebuttal evidence may not introduce issues not raised in the Respondent's Direct Case, and must be limited to countering evidence submitted by Intervenors in objection to the Reviewable Decision.
- c. An Intervenor may file and serve on all parties' rebuttal evidence no later than seven days after the deadline for the filing of responses to the Petitioners case by a Respondent or Intervenor. The Intervenors' rebuttal evidence may not introduce issues not raised in the Intervenors' Direct Case, and is limited to countering evidence submitted by an opposing Intervenor or Respondent.

7. Pre-Screening and Hearing -

- a. Upon receipt of the Appeal Notice, the Presiding Officer will schedule a prescreening conference to be conducted pursuant to 310 CMR 1.01(5)(a)15, and will send notice to all parties. Such prescreening conference will presumptively occur not more than 30 days after the Appeal Notice is filed. As used in this regulation, "presumptively" means that the time-line is binding, absent extraordinary circumstances in which case the Presiding Officer has authority to extend the time-line.
- b. Upon receipt of the Appeal Notice, the Department will schedule a hearing and will send notice to all parties. A hearing will be presumptively held within 120 days after the Appeal Notice is filed.
- c. Intervenors who subsequently intervene shall promptly receive the notice, but intervention shall not change the schedule of the pre-screening conference or the hearing.
- d. Upon notice to the parties, the Presiding Officer may provide an opportunity for a simplified hearing conducted pursuant to 310 CMR 1.01(8)(a).
- e. If the Presiding Officer determines an appeal to be Major or Complex, she will adjust the schedule either by extending it up to 30 days, or by taking the matter ahead of other cases.
- f. All parties must attend and be prepared to discuss settlement and the narrowing of issues at the pre-screening conference. At the conclusion of the pre-screening conference or shortly thereafter, the Presiding Officer shall prepare and circulate a prescreening conference report, for any appeal not resolved in prescreening. The prescreening conference report shall contain a list of issues that are in dispute and which are legally relevant, and this list shall not go beyond the issues raised by the parties in their direct and rebuttal cases.

- g. The Presiding Officer shall conduct a hearing provided that the Petitioner or a respondent has requested one. At the hearing, the parties' Direct Cases shall consist of, and be limited to, the evidence contained in their respective Direct Cases and rebuttal evidence, subject to evidentiary rulings of the Presiding Officer. The primary function of the hearing shall be cross-examination of witnesses and an oral closing argument, at the Presiding Officer's discretion. The hearing shall be limited to one day, unless the Presiding Officer finds that there is good cause for a longer hearing.

8. Final Action -

The Presiding Officer shall issue a written recommended decision, not more than 30 days after the close of hearing, that shall include findings on the contested issues. The Commissioner shall issue a final written decision consistent with 310 CMR 1.01(14)(b), presumptively within 6 months of the Reviewable Decision, or in the case of an appeal deemed Major or Complex in which the schedule was extended, within 7 months of the Reviewable Decision. Should a party request a tentative decision, the request shall be governed by 310 CMR 1.01(14)(a).

9. Relationship to Other Rules of Adjudicatory Proceedings -

- a. To the extent there is conflict between the regulations governing wetland appeals set forth in 310 CMR 10.04 and 310 CMR 10.05(7)(j), on the one hand, and the Rules of Adjudicatory Proceedings set forth in 310 CMR 1.01, on the other hand, the former shall prevail.
- b. The following regulations shall apply to wetland appeals: 310 CMR 1.01(1); 1.01(2); (3); (4); (5); 6(c), (f), (g), (h), (i), (j), (k); (9); (10); 12(a), (c), (d); 13 (a), (b) (c), (e), (f), (g) (h), (j) (l),(n); and 14(b),(c), (d), (e), (f), (g).

10. Effective Date –

The revised procedures for wetland appeals set forth in 310 CMR 10.04 and 310 CMR 10.05(7)(j) take effect on xxx and shall apply to all wetland appeals for which a notice of claim is filed on or after xxx.

Insert in 310 CMR 1.08

310 CMR 1.08 Additional Adjudication Procedures

(d) Wetlands Permit Appeals. Appeals of Reviewable Decisions, as defined in 310 CMR 10.04, will be conducted in accordance with the provisions set forth in 310 CMR 10.05(7)(j).